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No. 96-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, LOCAL 23-25, ILGWU,
Petitioner,

v.

ALAN LIN,
Respondent.

On Petiiton for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION BY THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Building and Construction Trades Department, AFL-CIO, hereby moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner in the above-styled case. The petitioner has granted his consent; the respondent, however, has denied his consent. In support of this motion the movant shows as follows:

1. The Building and Construction Trades Department, AFL-CIO, represents more than three million laborers

and mechanics employed in the construction industry throughout the United States, and fifteen national and international labor unions, many of whose members are employed in the construction industry.

In its most particularized terms, the instant case concerns the preemptive effect of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000 *et seq.* ("ERISA"), on a New York statute that holds the principal shareholders of closely-held corporations secondarily liable for certain kinds of debts the firm has incurred where the firm itself is judgment proof.

At the same time the decision below is of a piece with the lower court ERISA preemption decisions addressed to the cognate state laws—providing for "mechanics" liens—that, like "shareholder liability" laws, provide a measure of security to those who provide goods and services to construction contractors in exchange for a promise of later payment.

Indeed, the litigation that has generated this body of lower court decisions has, for the most part, arisen in the building and construction industry. And, it is that industry—and its workers—which have felt the heaviest brunt of the decisions giving ERISA's preemption provision what this Court's most recent ERISA preemption decisions through *California Division of Labor Standards v. Dillingham Construction Co.*, —— U.S. ——, 65 L.W. 4097 (Feb. 18, 1997), reveal to be an overly broad reading.

2. Against this background the interest of the Building and Construction Trades Department and its construction industry members could not be more immediate. And, consistant with that interest, in the *amicus curiae* brief attached hereto the Department seeks to put the question presented by the *certiorari* petition in its broader context, to outline the path of development of the construction industry ERISA preemption cases, and to identify both the internal inconsistencies in the lower court

law and the tension between the majority view in the lower courts and this Court's view on the scope and nature of ERISA preemption. All of that, we submit, underlines the need for review of the decision below by this Court and for a grant of *certiorari* here.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

The Building and Construction Trades Department, AFL-CIO, files this brief *amicus curiae* contingent on the granting of the foregoing motion for leave to file said brief, as provided for in the Rules of this Court. The interest of the *amicus curiae* in this case is set out in that motion.*

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* No counsel for a party authored this brief *amicus curiae* in whole or in part and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its most particularized terms, the instant case concerns the preemptive effect of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000 *et seq.* ("ERISA"), on a New York statute that holds the principal shareholders of closely-held corporations secondarily liable for certain kinds of debts the firm has incurred where the firm itself is judgment proof.

But precisely because that New York law is only one variation on a larger legislative theme—providing suitable protections to those who contract with small, thinly capitalized firms to provide goods and services, and who then provide such goods and services, in exchange for later payments by the firm—the ERISA preemption question presented here is of far greater import and the ramifications of the decision below are far more widespread.

The decision below is of a piece with a body of lower court law addressing that larger legislative theme. And, as the *certiorari* petition shows, that lower court law has developed in fits and starts, is marked by discord and conflict, is shot through with anomalies and, more often than not, calls for the invalidation of state laws on an understanding of ERISA preemption profoundly at odds with this Court's most recent ERISA preemption decisions —*John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. ——, 115 S.Ct. 1671 (1995); and *California Division of Labor Standards v. Dillingham Construction Co.*, —— U.S. ——, 65 L.W. 4097 (Feb. 18, 1997).

The litigation that has generated this body of lower court law has, for the most part, arisen in the building and construction industry. And, it is that industry—and its workers—which have felt the heaviest brunt of the decisions giving ERISA's preemption provision what *John Hancock, Travelers* and *Dillingham* reveal to be an overly broad reading.

That being so, it is the purpose of this brief *amicus curiae* to put the question here in its broader context.

We begin by reviewing the characteristics of the construction industry which have given rise to the need to protect those who do business with construction contractors and the legislative solution that every state has arrived at—the "construction" or "mechanics" lien.

We then trace the path of development of the construction industry ERISA preemption cases—which has paralleled the development of the lower-court law with respect to "shareholder liability" laws—and show that the majority view in the lower courts with respect to both mechanics lien, and shareholder liability, laws is at war with this Court's current understanding of the sweep of ERISA preemption as stated in *John Hancock, Travelers,* and *Dillingham.*

Finally, we show that the lower court law—both as to mechanics lien, and shareholder liability, laws—has the anomalous result of affording ERISA-covered benefits a disfavored status; draws arbitrary lines between preempted and non-preempted state causes of action; and overrides state law absent any conflict with ERISA's policies, any theory as to why Congress would have intended to displace state law, or any evidence of such a quixotic congressional intent.

All this, we submit, underlines the need for review of the decision below by this Court and for the grant of *certiorari* here.

ARGUMENT

1. The building and construction industry—like, *e.g.,* the garment industry out of which the instant case arises—is populated by vast numbers of small enterprises. There are, for eample, approximately 525,000 construction firms in the United States, of which 425,000 (81.0%) have fewer that 10 employees. Indeed, the average construction enterprise—even taking into account the relative handful of large employers—employs 7.4 employees; for

the firms with fewer than 10 employees, the average is just 2.7 workers.[1]

These small firms tend to be thinly capitalized; indeed, most often the workers even supply their own tools. Yet the firms often handle large contracts and incur large obligations—to suppliers of material, to subcontractors, and to their employees. All too often the firms vanish, sometimes for legitimate, and sometimes for not-so-legitimate, reasons. And, because the firms take the corporate form, when the legal entity ceases to exist or becomes judgment-proof, traditional corporate law would leave suppliers, subcontractors, and workers without recourse.

The New York law at issue here represents an attempt to address this problem in terms that span industry lines through the creation of a secondary, shareholder liability for any judgment-proof, closely-held corporation. The law governing comparable contractual relations in the construction industry has generated a cognate, industry-specific approach: the "construction" or "mechanics" lien.

"A mechanics lien is a statutory lien on real estate which provides security for the payment for labor or materials." 53 Am. Jur. 2d, *Mechanics Liens* § 3 (1996). These liens originated in early England. *Fifty State Construction Lien and Bond Law* iii (R. Cushman ed. 1992) (hereinafter "*Fifty State*"). And, in the United States, mechanics liens have been recognized almost as long as the Republic. *See Winder v. Caldwell*, 55 U.S. (14 How.) 434, 436-37 (1852) (discussing Maryland's 1791 Act and the District of Columbia's 1833 law). At least by the end of World War II, "practically all, if not all, of the states" had enacting mechanics lien laws. 37 C.J.S. *Mechanics Liens* § 3 (1948 ed.). "The theory and purpose of [these] statutes are to protect persons who have, in good faith, contributed labor or material to the construction, improvement, or repair of a building or other

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[1] Commission on the Future of Worker-Management Relations, *Fact Finding Report* at 95 (May, 1994).

structure, thereby enhancing the value of the land, by according them security for their compensation independent of the account of indebtedness between the owner and the contractor." *Id.*

2. Like the New York shareholder liability law at issue here, mechanics lien laws—and other supplementary statutes enacted for the benefit of obligees of construction firms—have come under ERISA preemption attack.[2] The lower court ERISA preemption law with respect to these related statutory responses to a single problem has developed in tandem. The earliest lower court cases—on shareholder liability laws like the New York statute and on construction industry-specific mechanics lien statutes—looked with favor on the continued vitality of the state law. For example, in *Carpenters Health and Welfare Fund v. Ken P. Ambrose Inc.*, 727 F.2d 279, 282 n.5 (3rd Cir. 1983), the Third Circuit sustained against an ERISA challenge a Pennsylvania shareholder liability law quite similar to the New York statute at issue here. One year later, the Ninth Circuit suggested—without finally deciding—that a mechanics lien law would survive ERISA preemption challenge. *Carpenters Southern California Administration Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984). *See also Carpenters Southern California Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984) (surety law) (semble).

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[2] Mechanics liens generally can only be placed upon privately-owned, as distinguished from public, land; as a result, states generally require construction firms working on public projects to take out a surety bond to protect their suppliers and employees in the event the firm becomes judgment proof. *See generally Fifty States.* In addition, at least four states have enacted "stop notice" laws which, in a variety of ways, permit unpaid workers and suppliers to stop payments or loan disbursements to a construction firm pending payment by that firm of its obligations. *See Fifty States* 3.17 (Alaska), 6.7 (California), 31.5 (New Jersey), 32.19 (New Mexico).

The leading cases concern the preemption *vel non* of these types of laws, as well as the conventional mechanics lien law, are cited in Table 1 to the *certiorari* petition, Pet. 22-25.

The course of the law began to shift, however, when this Court issued its first series of ERISA preemption decisions. For those decisions indicated that ERISA displaces any and all state laws having "a connection with or reference to" a pension, or health and welfare, plan. *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1963).

In the wake of those decisions, the Third Circuit overturned its decision in *Ambrose, supra*, and held the Pennsylvania shareholder liability law preempted on the ground that "[w]e do not believe that . . . *Ambrose* can survive *Shaw* and *Metropolitan Life* [*Insurance Co. v. Mass.*, 471 U.S. 724 (1985)]." *McMahon v. McDowell*, 794 F.2d 100, 107-08 (3rd Cir. 1986).

The Ninth Circuit took the same approach with respect to its earlier decisions concerning mechanics lien laws, concluding that "the broad language of the Supreme Court . . . placed the continuing validity of our earlier holdings in serious doubt" and required "a much broader reading of the ERISA preemption provision that we recognized." *Trustees of Electrical Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865, 867-68 (9th Cir. 1992). And, at least four circuits have now held that mechanics lien, and related, laws are preempted by ERISA.[3]

All those decisions preceded this Court's reexamination of its ERISA preemption doctrine beginning in *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993). As Justice Scalia has noted the more recent cases represent a "new approach"—and a

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[3] *Bricklayers Local 33 Benefit Funds v. America's Marble Source Inc.*, 950 F.2d 114 (3d Cir. 1991) (stop notice); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir.), *cert. denied*, 497 U.S. 10245 ((1990) (mechanics lien); *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127 (9th Cir. 1991) (same); *McCoy v. MIT*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) (same).

more searching approach—to ERISA preemption, *Dillingham, supra,* 65 L.W. at 4103 (concurring opinion)--an approach founded in the realization that, as *Travelers, supra,* states, "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.' " 115 S. Ct. at 1677.

The decision earlier this Term in *Dillingham*—a decision which, of course, post-dates the decision below—is especially instructive. There, the Court reversed the Ninth Circuit's invalidation, on ERISA preemption grounds, of a California statute setting a sub-minimum wage for apprentices who are enrolled in state certified apprenticeship programs and are working on public works projects—and *only* such apprentices—even though that law has a plain connection to, and necessary effect on, ERISA apprenticeship plans. But, notwithstanding that relation, "[t]he wages to be paid on public works projects . . . are . . . quite remote from the areas with which ERISA is expressly concerned" and are in "an area of traditional state regulation." 65 L.W. at 4101, 4102. Given that, given that the state law did not "bind ERISA plans to anything," and given the "paucity of indication in ERISA and its legislative history of any intent on the part of Congress to preempt state apprenticeship training standards, or state prevailing wage laws that incorporate them," the Court held that the "tenuous . . . relation" between the state law and ERISA plans is not a sufficient basis to hold that state law to be preempted by ERISA. *Id.*

Not surprisingly, this Court's reevaluation of the ERISA preemption doctrine has caused a number of state courts to take a second look at whether mechanics liens—and other laws whose only effect is to regulate the contractual relations between employing entities and employees in a manner that does not affect the substantive terms of these contracts but only the options for enforcement and "the money available for payment," *Seaboard Surety Co.*

v. Indiana State District Council of Laborers, 645 N.E.2d 1121, 1127 (Ind. App. 1995)—are, indeed, preempted by ERISA. This development is summarized in the *certiorari* petition at pp. 14-15.

As the *certiorari* petition so clearly shows, the result has been to heighten the discord in the state court and federal appellate court law. That discord is perhaps best demonstrated by the fact that the Second Circuit and the New York Court of Appeals have reached precisely the opposite conclusion as to whether the very statute at issue here is preempted by ERISA. *See* Pet. 11-12.

3. The lower court law in this area is not simply discordant; it is, moreover, incoherent—riddled with anomalies and internal inconsistencies which only this Court can resolve.

(a) The first anomaly is that the lower courts, in addressing both shareholder liability, and mechanics lien, laws, have read ERISA to afford ERISA-covered benefits a *disfavored* status. Mechanics liens, for example, can still be used to collect payments for materials supplied to a contractor, or to collect payments of wages or non-ERISA benefits for labor provided to the contractor. But such liens cannot be used secure unpaid contributions for fringe benefits owed on account of the very same labor.

Similarly, under the decision below, employees of a judgment-proof, closely-held New York corporation who are owed back wages and any benefits not covered by ERISA are free to seek to recover those wages and benefits from the principal shareholders. But the New York law cannot be used to recover that part of the contractual promise that involves the payment of ERISA benefit contributions for the labor that has been performed.

This anomaly is compounded by the Second Circuit's holding in *Albradco, Inc. v. Bevona,* 982 F.2d 82 (2d Cir. 1992), that the New York law is *not* preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. That decision, when coupled with the decision in the instant case, means that a union which

has collectively bargained for wages and benefits with a firm which has become judgment proof could sue on the state law to recover the contractually-specified wages and benefit contributions without running afoul of § 301 preemption law, but that suit is blocked by the ERISA preemption doctrine with regard to the promised ERISA benefit contributions. And, the Second Circuit has reached these results notwithstanding the fact that ERISA preemption was largely "modeled after § 301 of the LMRA." *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 51, 55 (1987).

(b) The court of appeals here—like the courts in the mechanics lien cases—justified its decision to preempt the New York law as that law applies to ERISA benefits largely on the ground that "the relevant sections of ERISA specify who must (and by implication, who need not) fulfill the employer's obligation to pay ERISA benefits, while the state law designates who *else* must fulfill that obligation (placed by ERISA on employers only)." Pet. App. 35a. Yet as a result of this Court's decision last Term in *Peacock v. Thomas,* —— U.S. ——, 116 S.Ct. 862 (Feb. 21, 1996)—which teaches that there is no basis in ERISA for the assertion of federal jurisdiction over state-law proceedings to enforce ERISA judgments—it seems clear that, at least in the context of proceedings to enforce an ERISA judgment, state law *may* determine "who else must fulfill [a contribution] obligation."

The court of appeals attempted to square its holding with *Peacock* by stressing that under the law at issue here—and in contrast to a judgment-enforcement proceeding—the plaintiff must prove up the firm's default on a benefit contribution obligation and thus must prove, as an element of the state-law claim, facts that would constitute an ERISA violation as well. *See* Pet. App. 16a-17a. Yet the court below—in line with other circuits—has itself held that a state law action on a surety bond to collect ERISA benefit contributions is *not* preempted even though the plaintiff in such an action must "prove as an element of its claim on the bond that [the

employer] had defaulted on its obligations." *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 570 (2d Cir. 1995).

The court of appeals thus would have it that the states are *not* preempted from imposing state-created rules of secondary liability beyond the corporate entity for pension or welfare contributions (*Peacock*); that the states are *not* preempted from adjudicating failure-to-contribute claims in the course of enforcing surety promises (*Greenblatt*); but that the states *are* somehow preempted from adjudicating such claims in the course of enforcing state-created secondary liabilities beyond the corporate entity. To this it is appropriate to recall that Holmes did not say that the law has to be illogical.

(c) All of this, in our view, is merely a prelude for what we submit is the largest anomaly in the lower court majority view.

As we have seen, the courts of appeals—on reasoning quite similar to the reasoning of the court below—have held that, outside of the judgment-enforcement context, ERISA displaces all state laws, including mechanics lien laws, which extend liabilities for ERISA contributions or ERISA benefits beyond the corporate entity that promised to make the payments. Since preemption is ultimately a matter of congressional intent, these courts necessarily have concluded that Congress in enacting ERISA intended to turn the clock back 200 years and effectively repeal the mechanics lien laws which were such a fundamental part of the legal landscape when ERISA was enacted.

No court, so far as we are aware, has ventured any theory as to why Congress might have desired to thus relieve those who derive the benefit of construction contracts of the obligation to stand behind the contractors they retain, or why Congress might have desired to strip this protection from construction workers.

Nor has any court, so far as we are aware, identified any respect in which mechanics lien laws—which operate

only on third parties and do not directly regulate any ERISA-regulated entity—contravene any of the policies underlying ERISA.

Indeed, it is difficult to imagine how ERISA could be offended by a state law which merely says to entities that retain construction contractors that they will have to stand behind the contractors to the extent the contractors enter into executory contracts, receive the benefits of services under such contracts, and then fail to make the agreed-upon payments for those services.

Yet the majority of the lower courts, through formulaic analysis, have been quick to impute to Congress what can only be considered a quixotic intent.

Although the shareholder liability law directly at issue here does not have the same venerable history as mechanics lien laws and although shareholder liability laws have been enacted by fewer states, these two closely-related kinds of laws have generated a single body of lower court ERISA preemption law. And, like the case law regarding the mechanics lien laws, the decision below rests on formulaic analysis rather than on identifying any real conflict between the state law and the policies of ERISA.

The underlying theme of *Travelers, supra*, and *Dillingham, supra*, is that this type of decision-making will not do. And, given what is at stake here in real-world terms, we respectfully urge the Court to grant the instant *certiorari* petition and either set the case for plenary consideration or, at the very least, remand it for reconsideration by the Second Circuit in light of *Dillingham*.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

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